IN THE HIGH COURT FOR THE STATES OF PUNJAB AND HARYANA AT CHANDIGARH

C.P. No.226 of 1998 (O&M)
Date of Decision: 17.04.2009

2. **C.A. No.617 of 1998**

3. **C.A. No.111 of 2001**

4. **C.A. No.750 of 2003**

5. **C.A. No.95 of 2007**

IN THE MATTER OF

M/s Sound Fibre, a proprietorship firm of Roger Berg through its Attorney and agent Mr. S.K. Verma

.....Petitioner

Versus

M/s B.K. Duplex Ltd .....Respondent

Present: Mr. Salil Sagar, Sr. Advocate with
Mr. Samarth Sagar, Advocate
for the petitioner.

Mr. R.C. Setia, Sr. Advocate with
Mr. Anish Setia, Advocate
for the respondent.

CORAM:HON'BLE MR. JUSTICE K. KANNAN

1. Whether Reporters of local papers may be allowed to see the judgment ?
2. To be referred to the Reporters or not ?
3. Whether the judgment should be reported in the Digest ?

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K. KANNAN J.

I. Scope:-

1. The petition for winding of the company has been filed at the

instance of a creditor on a contention that for a debt due by the respondent company to the petitioner, a statutory notice had been issued and although the liability was an admitted one, the amount had not been paid. Treating the company as one which is unable to pay its debts, the petition for winding up was filed. Some more details are necessary for a case that has been instituted in the year 1998 and which is arriving for its adjudication at this length of time.

II. <u>Liability of the company wholly admitted:-</u>

2. The petition filed under Section 439 read with Section 433 (C), (E) and (F) and Section 434 read with Section 439 (1) read with the relevant Company Rules had been originally instituted by the petitoner describing itself as a company. Later, on objections on behalf of the respondent, an amendment had been made describing the petitioner as a proprietorship having its office in Los Angeles and represented through a constituted attorney and agent Sh. S.K. Verma. The basis of the claim was for value of goods supplied to the respondent company and at the time of filing of the petition, the petitioner had complained that the respondent company was indebted to a sum of US $ 91,702.72 with interest. The petitioner had also spelt out the details of the invoices for the goods supplied. Prior to the filing of petition also, there had been exchange of communication when by a letter dated 10.04.1997, the respondent company admitted the reference to the invoices and the amounts mentioned under the respective invoices as having been finalized and while admitting its liability, the company stated in the following words:-

> ".....Due to the new Budget, the situation in the market is

showing signs of improvement, we are very hopeful that we should be able to release all your dues by end of next quarter....."

III. Satutory notice and plea of financial stringency by the company:-

3. In partial fulfillment of the liability, the respondent company had paid US $ 7273.65 after a notice was issued on 02.03.1998 (Annexure P-9), calling upon the respondent company to pay US $ 91702.72 and apprising the company of the fact that the notice would be treated as one issued under Sections 433 and 434 of the Companies Act. Even to this notice, the respondent company did not deny its liability but in its reply dated 23.03.1998 (Annexure P-10), the company had stated thus:-

"....We have already confirmed to pay the payments to your client. We never refused to pay the payment to the party. We are trying to manage the funds to pay the payments. You are aware that there is a slump in the market and not only we are facing financial crunch, the position of all the Paper/Duplex Mills is the same. So it is not possible to pay this huge amount at one time. We would like to clear the payment by installments which will start from 31.03.1998 onwards...." (emphasis supplied)

IV. Company's inability to pay comprehensively admitted and reiterated:-

4. It appears that the respondent company back-tracked from its promises of payments as made in its reply but started taking up issues, like the quality of the goods supplied was not good and they are unable

to make the payments. In the letter of the respondent company sent later (Annexure 45), there is a reference to the fact that petitioner company itself had consented to discount the bills by 45000 US Dollars. The respondent company thanked the petitioner for its show of concession, again reiterated that the amounts due to the petitioner company would be paid soon. As regards the financial condition, the respondent company again stated, "we are fighting hard with the financial crunch hammered on us by the uneven market situation. We agreed for release of payments on fortnightly basis presuming that our payments will come fast after festival days which is becoming impossible for us. All our customers are postponing the due dates of payments."

V. <u>Payment of a portion of admitted liability on interim directions of Court- a cause for whimper of protest:</u>

5. After the petition was filed and after several hearings from the year 1998, nothing else changed for the petitioner except that by an order dated 26.05.2006, this Court was pleased to direct the respondent company to pay Rs.5 lacs to the petitioner without prejudice to the rights and contentions of the respondents. This order was challenged in appeal by the company before a Division Bench but the Division Bench refused to interfere with the order upon which ultimately the respondent company made the payment of Rs.5 lacs. This payment, which was made on 22.01.2007 was not allowed to go unchallenged and the respondent company filed C.A. No.95 of 2007 seeking for a direction to the petitioner to put the money back, since according to the respondent company, the petitioner represents the general body of creditors and while asking the petition for winding up,

the money shall not be allowed to be retained by the petitioner company itself. The learned Senior Counsel appearing for the respondent company urged that even the petition for winding up ought not to be taken up without directing the petitioner company to repay Rs.5 lacs, which was paid by the respondent company.

VI. Twin objections by the company:-

6. Before me, on a pointed reference by the learned Senior Counsel appearing for the petitioner to the admissions made by the respondent company to the liability and that there was a clear inability of the respondent company to pay the debt, which was due, the learned Senior Counsel for the respondent company skirted the issue and sought his defence essentially on two points; one, the petition which had been filed through a power of attorney, Mr. S.K. Verma was not a duly appointed attorney with a specific power to present and verify a company petition for winding up and therefore, the petition was not maintainable. Two, that the unaudited financial statements filed upto September 1997 along with the petition by the petitioner company itself showed that the company was making profit and the company being not commercially insolvent, ought not to be directed to be wound up.

(i) Amplitude of powers of a duly constituted agent

7. As regards the first contention that the petition had not been filed properly through a lawfully constituted power of attorney, the learned counsel refers to the limited power of attorney filed by the petitioner, which states, inter alia, the following:-

> "To all persons, be it known, that I, Roger Berg, of Sound Fibre as Grantor, do hereby make and grant

a limited and specific power of attorney to Mr. S.K. Verma of Sneh International and appoint and constitute said individual as my attorney in fact.

My named attorney in fact shall have full power and authority to undertake, commit and perform only the following acts on my behalf to the same extent as if I had done so personally; all with full power of substitution and revocation in the presence: (describe specific authority).

Mr. S.K. Verma of Sneh International, 502-503 Shahpuri Tirath Singh Towers, C-58, C-Block Community Centre, New Delhi, India is authorized to file and fight the cases on behalf of Sound Fibre in Indian Courts." (emphasis supplied)

8. According to learned Senior Cousnel for the respondent company, the power granted to the petitioner "to file and fight the cases on behalf of the Sound Fibre in Indian Courts" does not mean a right to authority to file a petition for winding up. While considering this subject, it is also necessary to point out that if there was yet another power of attorney that was filed during the course of the proceedings along with C.A. No.111 of 2001, where another document Annexure A has been filed, which contains the following expressions:-

"To all persons, be it known, that I, Roger Paul Berg, of Sound Fibre as Grantor, do hereby make and grant a limited and specific power of attorney to Mr. S.K. Verma of Sneh International and appoint and constitute said individual as my attorney in fact.

My named attorney in fact shall have full power and authority to undertake, commit and perform only the following acts on my behalf to the same extent as if I had done so personally; all with full power of substitution and revocation in the presence: (describe specific authority).

Mr. S.K. Verma of Sneh International, 502-503 Shahpuri Tirath Singh Towers, C-58, C-Block Community Centre, New Delhi, India is authorized to file and fight the cases on behalf of Sound Fibre in Indian Courts. I ratify and endorse all of his actions that he has taken pursuant to my earlier power of attorney, dated May 6, 1998."

9. It may be noticed that the second document specificially ratifies and endorses all the actions that the power of attorney has taken pursuant to the earlier power of attorney dated 06.05.1998. It could further be seen by reference to documents filed that it is the very same power of attorney, Mr. S.K. Verma, who has issued a notice prior to filing of the petition on behalf of the petitioner reminding the respondent company of the outstanding due to the petitioner by his notice dated 19.12.1997 (Annexure P-8).

10. Learned Senior Counsel for the respondent company refers to a decision of the Bombay High Court in ***Shantilal Khushaldas and Bros. Pvt. Ltd. Vs. Smt. Chandanbala Sughir Shah and another 1993 (77) Comp Cas 253*** to contend that a constituted attorney must be specifically authorized to institute winding up proceedings and mere authorization to file suits or proceedings against company for recovery of dues was held as not sufficient. He would also rely on another

judgment of this Court in ***D.H.M. Framji and others Vs. The Eastern Union Bank Ltd. AIR (38) 1951 Punjab 371*** where the Court held in the following lines:-

> "A power of attorney has to be very strictly constituted. When the authority given to a person in the recitals is that he can do the acts enumerated in the various clauses of the power of attorney at a place where the company may have its branches, he cannot do these acts at place where the company has no office even though one of the clauses of the power of attorney gives the power to commence proceedings before "other offices in India touching any matter in which the Company may or hereafter be interested."

11. According to learned Senior Counsel, these two decisions would completely address the issue regarding the non-maintainability of the petition at the instance of the power of attorney, who had no competence to file the petition.

12. The strictness of construction that is imposed on a deed of power of attorney and found expressed in some judgments are to ensure that a person does not, by his act done in purported exercise of such power, traverse in excess of authority and commit breach of any liability or inflict harm or hardship not merely to the principal but also to any third party, who deals with such power of attorney. A company petition for winding up is invariably an extreme step and an authority granted merely to a person to institute a suit ought not to be understood as authorizing a person to even file a petition for winding up. Even the decision of this Court in **D.H.M. Framji's case** (supra)in laying down

the strict rule of construction was merely expounding the fundamental principle that an agent shall not bind the principal for activities more than what he was authorized to do. These decisions, in my view, however do not lend support to the extreme position canvassed by learned senior counsel for the respondents. On the other hand, the power of attorney granted sets out a larger boundary for the agent to traverse, when it describes not merely to a specific act of institution of suits for recovery of money as done in the Bombay High Court case cited above but sets out, "to file and fight the cases on behalf of Sound Fibre in Indian Courts". This expression is wide enough to describe every form of legal fight that could include even a petition for winding up of the company. Even otherwise, I do not feel obliged to accept any interpretation that could be placed in the decision ***Shantilal's case*** of the Bombay High Court which might fetter institution of a petition for winding up. In my view, the said decision adopts narrow construction, which could only aid unhealthy and unethical defences to be taken, when there is a clear mandate to an agent to do every act that is necessary for recovery of monies. I am unable to persuade myself to a reasoning that a proceeding for recovery of money could not be understood as coming within a proceeding for winding up under Section 433. A winding up process is not merely for the sake of folding up the operations of the company. The necessary denoeument of the winding up process is the distribution of proceeds to the creditors of the company, for without an ultimate objective for recovery of a debt, a petition for winding up itself assumes no significance. I, therefore, reject the contention made by the Senior Counsel for the

respondent that the petition is not maintainable at the instance of a person claiming to be a power of attorney and I hold that the power of attorney in the manner in which it is provided is wide in its amplitude to include even a petition for winding up of the company.

(ii) Inability to pay debt, the only statutory test

13. The second objection, which has been urged by the respondent company is that the unaudited statements referred to by the petitioner show that the company was making profits and therefore, without a clear finding that the company was commercially insolvent, a winding up ought not to be ordered. This is again a strange argument for, the mere fact that the company had been shown in the accounts as making profit does not make it commercially viable to run it and take it outside the purview of reach of Section 433, 434 and other relevant provisions. The statute itself provides a ground for ordering winding up and make a statutory presumption under Section 434 of the Companies Act that after issue of notice and if the "the company has for three weeks thereafter neglected to pay the sum, or to secure or compund for it to the reasonable satisfaction of the creditor", the company would be "deemed unable to pay its debts." It might be possible for a respondent company to say in a case where the liability is disputed that the provisions of Section 433, 434 and 439 could not be used to arm-twist the company into succumbing to a disputed liability. Defences that may be possible for a respondent company where that the financial condition of the company is solvent shall be definitely circumstances when the Court shall not order winding up or if the liability is denied, disputed or there is a semblance of defence in an

action that could be initiated for recovery of money.

(iii) Seemingly healthy balance sheet, not the test

14. However, to say that the mere fact that an audited stratement shows some profits as having been posted would be a complete answer in all cases to stave off a petition for winding up would be at complete variance to the clear legislative intent and the language employed under the relevant provisions of the Companies Act. Every company that posts profits in its account statement cannot be taken up at its face value, if the recent incidents of massive corporate frauds afflicting the Indian Corporate World is any lesson to us. It has not just happened in India. What was SATYAM in India was CENTRO in Australia or ENRON in US. The bankruptcy of a company could be concealed by a clever manoeuvres but the acid test always is that when a demand is made for recovery of sums due by a creditor and if the company is unable to pay and states in unmistakable terms that it was passing through financial crunch that makes it impossible to accommodate the request for payment, it is as clear as sunlight that the company is in financial doldrums. Even otherwise, a company that has stacked its funds in bank or in the pockets of its directors cannot deny to a creditor what is justly due and defy, if such a creditor makes his demand that the remedy shall be a suit for recovery for money. A company that is unwilling to pay for no reasons and forces creditor to unviable ways of recovery, even when the liability to the creditor is an admitted fact has ethically no right to continue its operations. The winding up in such case is the only answer and a forcible fold up of such recalcitrant companies that betray lack of commercial morality and bring shame to

corporate governance, is the need of the hour. The conduct of the respondent company that refuses to pay a paltry sum at the directions of the court and unwillingly paying the amount at the direction of the Division Bench, seeking the money to be put up back on a specious plea that the petitioner represents only the body of creditors and petitioner cannot be heard in its petition for winding up without parting with the funds, which it had received, is a company that shall be asked to down its shutters. After all, the amount that was paid has not gone into thin air, and if necessary, the Company Court will have the power to direct the petitioner to put the money into the hotchpot to be available for distribution, if the assets of the company are not sufficient to answer all the claims of the creditors and workers.

(iv) When liability is admitted and company is unable to pay, winding up and not a suit is the appropriate remedy

15. The learned Senior Counsel refers to certain decisions to drive home the point that a company petition could not be used as a pressure tactic for recovery of monies where a proper remedy will be a civil suit. I do not propose to dwell at length or to cite the decisions for the only reason that when the liability is disputed, the proper remedy would be only a civil suit. Decisions rendered in the company jurisdiction by various High Courts have clearly laid down that whenever there is a likelihood of a valid defence or when the liability is disputed, the appropriate remedy would be only a civil suit and not a petition for winding up. These principles cannot be extended to an open and shut case of liability such as what obtains in this case where by several communications, the respondent has admitted that the money

is due and that it was unable to pay the money to the petitioner. For the same reason, the several decisions referred to by the learned Senior Counsel for the petitioner that where a prima facie existence of a debt was proved, a petition for winding up could be filed are not replicated here.

VII. Conclusion:-

16. In the circumstances, I am of the clear view that the company is unable to pay its debts and the affairs of the company cannot be carried on. The company is required to be wound up and ordered accordingly.

17. The notice of the order of winding up shall be filed with the Registrar of Companies and also communicated to the Official Liquidator attached to this Court. The advertisement of factum of winding up shall also be made within 14 days from the making of the order in "The Tribune (Chandigarh-Delhi Edition)" and in "Dainik Bhaskar-Hindi" as well Official Gazette of Punjab Government.

18. A photostat copy of this order be placed on each connected case.

(K. KANNAN)
JUDGE

April 17 , 2009
Pankaj*